

105TH CONGRESS
2D SESSION

S. 314

AN ACT

To provide a process for identifying the functions of the Federal Government that are not inherently governmental functions, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Federal Activities In-
5 ventory Reform Act of 1998”.

1 **SEC. 2. ANNUAL LISTS OF GOVERNMENT ACTIVITIES NOT**
2 **INHERENTLY GOVERNMENTAL IN NATURE.**

3 (a) **LISTS REQUIRED.**—Not later than the end of the
4 third quarter of each fiscal year, the head of each execu-
5 tive agency shall submit to the Director of the Office of
6 Management and Budget a list of activities performed by
7 Federal Government sources for the executive agency that,
8 in the judgment of the head of the executive agency, are
9 not inherently governmental functions. The entry for an
10 activity on the list shall include the following:

11 (1) The fiscal year for which the activity first
12 appeared on a list prepared under this section.

13 (2) The number of full-time employees (or its
14 equivalent) that are necessary for the performance
15 of the activity by a Federal Government source.

16 (3) The name of a Federal Government em-
17 ployee responsible for the activity from whom addi-
18 tional information about the activity may be ob-
19 tained.

20 (b) **OMB REVIEW AND CONSULTATION.**—The Direc-
21 tor of the Office of Management and Budget shall review
22 the executive agency's list for a fiscal year and consult
23 with the head of the executive agency regarding the con-
24 tent of the final list for that fiscal year.

25 (c) **PUBLIC AVAILABILITY OF LISTS.**—

1 (1) PUBLICATION.—Upon the completion of the
2 review and consultation regarding a list of an execu-
3 tive agency—

4 (A) the head of the executive agency shall
5 promptly transmit a copy of the list to Congress
6 and make the list available to the public; and

7 (B) the Director of the Office of Manage-
8 ment and Budget shall promptly publish in the
9 Federal Register a notice that the list is avail-
10 able to the public.

11 (2) CHANGES.—If the list changes after the
12 publication of the notice as a result of the resolution
13 of a challenge under section 3, the head of the execu-
14 tive agency shall promptly—

15 (A) make each such change available to the
16 public and transmit a copy of the change to
17 Congress; and

18 (B) publish in the Federal Register a no-
19 tice that the change is available to the public.

20 (d) COMPETITION REQUIRED.—Within a reasonable
21 time after the date on which a notice of the public avail-
22 ability of a list is published under subsection (c), the head
23 of the executive agency concerned shall review the activi-
24 ties on the list. Each time that the head of the executive
25 agency considers contracting with a private sector source

1 for the performance of such an activity, the head of the
2 executive agency shall use a competitive process to select
3 the source (except as may otherwise be provided in a law
4 other than this Act, an Executive order, regulations, or
5 any Executive branch circular setting forth requirements
6 or guidance that is issued by competent executive author-
7 ity). The Director of the Office of Management and Budg-
8 et shall issue guidance for the administration of this sub-
9 section.

10 (e) **REALISTIC AND FAIR COST COMPARISONS.**—For
11 the purpose of determining whether to contract with a
12 source in the private sector for the performance of an ex-
13 ecutive agency activity on the list on the basis of a com-
14 parison of the costs of procuring services from such a
15 source with the costs of performing that activity by the
16 executive agency, the head of the executive agency shall
17 ensure that all costs (including the costs of quality assur-
18 ance, technical monitoring of the performance of such
19 function, liability insurance, employee retirement and dis-
20 ability benefits, and all other overhead costs) are consid-
21 ered and that the costs considered are realistic and fair.

22 **SEC. 3. CHALLENGES TO THE LIST.**

23 (a) **CHALLENGE AUTHORIZED.**—An interested party
24 may submit to an executive agency a challenge of an omis-
25 sion of a particular activity from, or an inclusion of a par-

1 ticular activity on, a list for which a notice of public avail-
2 ability has been published under section 2.

3 (b) INTERESTED PARTY DEFINED.—For the pur-
4 poses of this section, the term “interested party”, with re-
5 spect to an activity referred to in subsection (a), means
6 the following:

7 (1) A private sector source that—

8 (A) is an actual or prospective offeror for
9 any contract, or other form of agreement, to
10 perform the activity; and

11 (B) has a direct economic interest in per-
12 forming the activity that would be adversely af-
13 fected by a determination not to procure the
14 performance of the activity from a private sec-
15 tor source.

16 (2) A representative of any business or profes-
17 sional association that includes within its member-
18 ship private sector sources referred to in paragraph
19 (1).

20 (3) An officer or employee of an organization
21 within an executive agency that is an actual or pro-
22 spective offeror to perform the activity.

23 (4) The head of any labor organization referred
24 to in section 7103(a)(4) of title 5, United States
25 Code, that includes within its membership officers or

1 employees of an organization referred to in para-
2 graph (3).

3 (c) TIME FOR SUBMISSION.—A challenge to a list
4 shall be submitted to the executive agency concerned with-
5 in 30 days after the publication of the notice of the public
6 availability of the list under section 2.

7 (d) INITIAL DECISION.—Within 28 days after an ex-
8 ecutive agency receives a challenge, an official designated
9 by the head of the executive agency shall—

10 (1) decide the challenge; and

11 (2) transmit to the party submitting the chal-
12 lenge a written notification of the decision together
13 with a discussion of the rationale for the decision
14 and an explanation of the party's right to appeal
15 under subsection (e).

16 (e) APPEAL.—

17 (1) AUTHORIZATION OF APPEAL.—An inter-
18 ested party may appeal an adverse decision of the
19 official to the head of the executive agency within 10
20 days after receiving a notification of the decision
21 under subsection (d).

22 (2) DECISION ON APPEAL.—Within 10 days
23 after the head of an executive agency receives an ap-
24 peal of a decision under paragraph (1), the head of
25 the executive agency shall decide the appeal and

1 transmit to the party submitting the appeal a writ-
2 ten notification of the decision together with a dis-
3 cussion of the rationale for the decision.

4 **SEC. 4. APPLICABILITY.**

5 (a) EXECUTIVE AGENCIES COVERED.—Except as
6 provided in subsection (b), this Act applies to the following
7 executive agencies:

8 (1) EXECUTIVE DEPARTMENT.—An executive
9 department named in section 101 of title 5, United
10 States Code.

11 (2) MILITARY DEPARTMENT.—A military de-
12 partment named in section 102 of title 5, United
13 States Code.

14 (3) INDEPENDENT ESTABLISHMENT.—An inde-
15 pendent establishment, as defined in section 104 of
16 title 5, United States Code.

17 (b) EXCEPTIONS.—This Act does not apply to or with
18 respect to the following:

19 (1) GENERAL ACCOUNTING OFFICE.—The Gen-
20 eral Accounting Office.

21 (2) GOVERNMENT CORPORATION.—A Govern-
22 ment corporation or a Government controlled cor-
23 poration, as those terms are defined in section 103
24 of title 5, United States Code.

1 (3) NONAPPROPRIATED FUNDS INSTRUMENTAL-
 2 ITY.—A part of a department or agency if all of the
 3 employees of that part of the department or agency
 4 are employees referred to in section 2105(c) of title
 5 5, United States Code.

6 (4) CERTAIN DEPOT-LEVEL MAINTENANCE AND
 7 REPAIR.—Depot-level maintenance and repair of the
 8 Department of Defense (as defined in section 2460
 9 of title 10, United States Code).

10 **SEC. 5. DEFINITIONS.**

11 In this Act:

12 (1) FEDERAL GOVERNMENT SOURCE.—The
 13 term “Federal Government source”, with respect to
 14 performance of an activity, means any organization
 15 within an executive agency that uses Federal Gov-
 16 ernment employees to perform the activity.

17 (2) INHERENTLY GOVERNMENTAL FUNCTION.—

18 (A) DEFINITION.—The term “inherently
 19 governmental function” means a function that
 20 is so intimately related to the public interest as
 21 to require performance by Federal Government
 22 employees.

23 (B) FUNCTIONS INCLUDED.—The term in-
 24 cludes activities that require either the exercise
 25 of discretion in applying Federal Government

1 authority or the making of value judgments in
2 making decisions for the Federal Government,
3 including judgments relating to monetary trans-
4 actions and entitlements. An inherently govern-
5 mental function involves, among other things,
6 the interpretation and execution of the laws of
7 the United States so as—

8 (i) to bind the United States to take
9 or not to take some action by contract, pol-
10 icy, regulation, authorization, order, or
11 otherwise;

12 (ii) to determine, protect, and advance
13 United States economic, political, terri-
14 torial, property, or other interests by mili-
15 tary or diplomatic action, civil or criminal
16 judicial proceedings, contract management,
17 or otherwise;

18 (iii) to significantly affect the life, lib-
19 erty, or property of private persons;

20 (iv) to commission, appoint, direct, or
21 control officers or employees of the United
22 States; or

23 (v) to exert ultimate control over the
24 acquisition, use, or disposition of the prop-
25 erty, real or personal, tangible or intangi-

1 ble, of the United States, including the col-
 2 lection, control, or disbursement of appro-
 3 priated and other Federal funds.

4 (C) FUNCTIONS EXCLUDED.—The term
 5 does not normally include—

6 (i) gathering information for or pro-
 7 viding advice, opinions, recommendations,
 8 or ideas to Federal Government officials;
 9 or

10 (ii) any function that is primarily
 11 ministerial and internal in nature (such as
 12 building security, mail operations, oper-
 13 ation of cafeterias, housekeeping, facilities
 14 operations and maintenance, warehouse
 15 operations, motor vehicle fleet management
 16 operations, or other routine electrical or
 17 mechanical services).

18 **SEC. 6. EFFECTIVE DATE.**

19 This Act shall take effect on October 1, 1998.

 Passed the Senate July 30, 1998.

 Attest:

Secretary.

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